IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. SMITH and EILEEN SMITH	:	CIVIL ACTION
v.	:	
GERALD FRANCISCO and SOUTH JERSEY POLLUTION CONTROL, INC.	:	NO. 98-1553

MEMORANDUM AND ORDER

YOHN, J. January , 1999

Richard Smith ("Smith") filed this action against Gerald Francisco ("Francisco") and South Jersey Pollution Control, Inc. ("South Jersey") seeking damages for the injuries he received when he jumped off of a flatbed tractor trailer owned and operated by the defendants. Smith's wife, Eileen Smith, asserts a claim for loss of consortium that is dependent upon the success of her husband's negligence claim. Before this court is the defendants' motion for summary judgment which contends that they were not negligent because they owed no duty of care to Smith at the time he was injured, because Smith assumed the risk of his injuries, because their actions could not have caused Smith's injuries, and because Smith's actions were the superseding cause of his injuries. After considering the parties' submissions, I conclude that the defendants' motion will be denied.

FACTUAL BACKGROUND

Richard Smith is a boilermaker who was employed by Sun Company, Inc. at its refinery in Marcus Hook, Pennsylvania. On January 16, 1996, Smith and his co-workers were assigned to

move 12 forty-foot-long pipes from one area of the refinery to another. While he was helping to unload the pipes at their destination, Smith was injured when he jumped off the flatbed trailer loaded with the twelve-inch diameter steel pipes because they had begun to shift. The flatbed trailer on which the pipes were loaded was driven by Francisco and was owned by South Jersey. Smith claims that Francisco and, through him, South Jersey were negligent for two reasons: first, Francisco should have known that the pipes were improperly secured on the trailer because they were not individually chocked,[1] and second, Francisco did not park the trailer on a level surface and thus, should have known that the pipes were likely to roll to one side of the trailer.[2]

Defendants argue, to the contrary, that because Smith and his coworkers were responsible for loading and unloading the pipes, Francisco had no duty to ensure that Smith would not be injured during the unloading process as a result of the method used to load the pipes. Defendants further assert that Francisco only had a duty to inspect the pipes to make sure that they were safe for transportation, and pursuant to that duty, transported the pipes without incident. Once the pipes reached their destination, and Francisco verified that the load had arrived in the same condition in which it departed, defendants thus conclude, their duty was at an end. See Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defendants' Mem."), at 9. Defendants next argue that even if they owed a duty to Smith, Smith assumed the

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[1] "Chocking" a pipe means placing wedge-shaped wooden blocks, called "chocks," on the side of a pipe to keep it from rolling. See Deposition of Gregory G. Salvato, p. 13, l. 1-23; p. 19, l. 6-13 (explaining the use of chocks).

[2] Though Smith's Complaint asserts several reasons why Francisco was negligent, all of his claims that Francisco inadequately or improperly "inspected," "secured," and "checked" the load of pipes focus on Francisco's failure to insist that each pipe be chocked on both sides. See Plaintiffs' Reply to Defendants' Motion for Summary Judgment (Plaintiffs' Reply"), at ¶¶ 8, 13, 17, 19, 20, 21, 24, 33, 38.

risk of his own injuries by standing on top of the four pipes which had room to move in the trailer. See Defendants' Mem., at 14-15. Defendants also argue that their alleged negligence could not have caused Smith's accident because the accident was caused solely by his decision to stand on unchocked pipes. See Defendant's Mem., at 16. Finally, defendants argue that Smith's poor judgment in deciding to stand on the unchocked pipe was so unforeseeable that it was a superseding or intervening cause of his accident which cannot be causally connected to the defendants' alleged negligence. See Defendants' Mem., at 17.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If, after giving the nonmoving party the "benefit of all reasonable inferences," id. at 727, the record taken as a whole "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted. As there are contested issues of fact contained in the record before this court, summary judgment is inappropriate.

DISCUSSION

To prevail on his negligence claim, Smith must prove:

> (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.

Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1366 (3d Cir. 1993); Lyons v. City of Philadelphia, No. 98-2662, 1998 WL 767451, at *8 (E.D. Pa. Nov. 4, 1998); Morena v. South Hills Health Sys., 462 A.2d 680, 684, n.5 (Pa. 1983).

A. Reasonable Jurors Could Find that Francisco Owed a Duty to Smith

Defendants contend that Francisco's duty to Smith terminated when he delivered the load of pipes to its destination and unchained it, after ascertaining that its condition had not deteriorated because of its move. Smith counters that Francisco's duty to ensure the safety of the load he transported required him to inspect the load for safety and stability and that Francisco should have known that the pipes were loaded in an inherently unsafe fashion.

It is undisputed that Francisco had significant experience with the use of chocks and other devices to secure loads on flatbed trailers. See Francisco Dep., p. 28, l. 13 - p. 37, l. 17 (discussing Francisco's familiarity with chocks, side stanchions, pipe racks and contour boards). It is also undisputed that Francisco was familiar with the way that Sun employees loaded and unloaded pipes because he had worked at the Sun refinery for eight to ten years and had moved approximately 200 loads of pipe during that time. See Francisco Dep., p. 15, l. 16-p. 17, l. 12. Moreover, South Jersey's contract with Sun established that South Jersey employees had a general duty to "take all necessary and proper precautions to protect a Project Site and all persons

and property thereon from damage or injury." Contract between South Jersey and Sun Co. (attached to Plaintiffs' Reply as Exhibit C). These facts are sufficient to support plaintiffs' allegations that Francisco knew that, without individual chocks, the pipes that Smith loaded were likely to roll if he parked his truck on anything other than a level surface.

In light of Francisco's experience with moving and securing pipe, and as further support for their argument that Francisco owed a duty to Smith, the plaintiffs offer the affidavit and report of Norman Goldstein, a licensed professional engineer, who opined that Francisco

> should have known that when the pipes were going to be taken off, the remaining unchocked pipe could roll. This presents a serious risk of injury. Mr. Francisco should have either asked the Sun people to chock each pipe or chocked them himself. His failure to do this was a cause of the pipe rolling and the accident happening. When Mr. Francisco checked his load prior to applying his security chains, he also had an opportunity to express concern for the safety of unloading the unchocked pipes.

See Report of Norman Goldstein, at 4-5 (attached to Plaintiffs' Reply as Exhibit A). Plaintiffs also submit that Francisco admitted that he had a duty to inspect the pipes and to determine that they were loaded in a fashion that made them safe to unload.[3] See Deposition of Gerald Francisco ("Francisco Dep."), p. 69, l. 4-13. As the testimony of Goldstein and Francisco creates a genuine factual dispute about whether the defendants owed a duty to Smith, summary judgment

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[3] Francisco testified as follows:

Q: And when you took your chains off did you inspect the load at that time?
A: Yes.
Q: Is that your normal procedure?
A: Yes.
Q: And why do you do that?
A: To make sure nothing loosened up.
Q: To make sure nothing is going to roll or shift when they are unloading it, correct?
A: Right.

Francisco Dep., p. 69, l. 4-13.

is inappropriate at this stage.

B. Assumption of the Risk is a Component of the Duty Analysis

Defendants also argue that even if they had a duty to secure each pipe, Smith voluntarily "chose to stand on the pipes while unloading those pipes, and therefore, voluntarily assumed the risk that [the] pipes would shift while being unloaded." Defendants' Motion, at ¶ 37. Plaintiffs, on the other hand, argue that Smith had little experience with unloading pipes and did not understand the risk that the pipes might roll. See Plaintiffs' Reply, at 16.

Though the continuing validity of assumption of the risk as an affirmative defense under Pennsylvania law is somewhat cloudy, the Third Circuit has opined that Pennsylvania courts will continue to evaluate whether the plaintiff assumed the risk of his injuries in the process of determining whether the defendant had a duty to protect the plaintiff from the possibility of those injuries. See Kaplan v. Exxon Corp., 126 F.3d 221, 225 (3d Cir. 1997); Howell v. Clyde, 620 A.2d 1107, 1112-13 (Pa. 1993). This court cannot rule that Smith assumed the risk of his injuries unless "reasonable minds could not disagree" that Smith "discovered dangerous conditions which [were] both obvious and avoidable, and nevertheless proceed[ed] voluntarily to encounter them." Id. at 225-26 (quoting Carrender v. Fitterer, 469 A.2d 120, 125 (Pa. 1983)).

Though a jury may find that Smith, who had some experience as a rigger, was aware of the potential for the pipes to roll, the jury may also conclude that Smith was unloading the pipes as he was instructed to do, and thus, that his actions were not voluntary. See Deposition of William C. Turner, p. 32, l. 4-19 (Smith said that he had rigging experience when he applied for the job at Sun); Deposition of Richard A. Smith, p. 86, l. 20-p. 87, l. 3 (discussing the suddenness of the accident). Because Smith was working with Stephen Pandur, a more

experienced rigger, to unload the pipes, and because Pandur thought the load was stable and unloaded it as he normally unloaded pipes, the jury may conclude that Smith was following Sun's customary procedure for unloading pipes and did not know of a way to avoid the risk of rolling pipes. See Deposition of Stephen G. Pandur, p. 19, l. 9-13 (load was secure after transportation); p. 28, l. 11-p. 29, l. 8 (Pandur directed the unloading process). Because reasonable jurors may disagree about whether Smith voluntarily accepted the risk of rolling pipe resulting from the loading and unloading procedures, summary judgment is impossible. See Kaplan, 126 F.3d at 225.

C. Reasonable Jurors Could Conclude that Francisco's Actions Caused Smith's Accident

Defendants also argue that Smith has failed, as a matter of law, to demonstrate the third element of a negligence claim, that the defendants' actions caused his harm. Just as they argued that Francisco had no duty to Smith because Francisco was not personally involved in either loading or unloading the trailer, the defendants claim that they had no responsibility for the method of loading the pipes and therefore could not have caused Smith's accident. See Defendants' Mem., at 16. In response, Smith claims that Francisco's failure to secure the pipes appropriately was the direct cause of his accident. See Plaintiffs' Reply, at 17. For the same reason that summary judgment is inappropriate on the duty issue, it is inappropriate on the causation issue. See *supra* Part A. If the jury finds that the testimony of Goldstein is credible, and that Francisco had a duty to ensure that each pipe was chocked, the jury may well find that Francisco's breach of that duty was the direct cause of Smith's accident.

D. Reasonable Jurors Could Conclude That There Was No Break in the Causal Chain Between Francisco's Actions and Smith's Accident

Finally, defendants claim that Smith's decision to stand on the flatbed trailer with part of his weight on the remaining pipes, while waiting for the next group of pipes to be unloaded, was "so extraordinary as not to have been reasonably foreseeable." Powell v. Drumheller, 653 A.2d 619, 623 (Pa. 1995). There is no evidence in the record suggesting that Smith's actions were unforeseeable. To the contrary, Francisco testified that he often watched Sun work crews unloading trailers filled with pipe, and did not appear to believe that there was anything unusual about the way Smith and his co-workers unloaded these pipes. See Francisco Dep., p. 68, l. 10-21; p. 74, l. 6 - p. 77, l. 12. In fact, Francisco believes that Sun work crews still load and unload pipes today in the same way that they did on January 16, 1996. See Francisco Dep., p. 87, l. 3-16. As nothing in the summary judgment record indicates that Smith's actions were so "extraordinary," that they constitute a superseding act which breaks the causal chain flowing from Francisco's alleged negligence, summary judgment must be denied.

CONCLUSION

Because there are genuine issues of material fact which prevent this court from determining whether the defendants were negligent, the defendants' Motion for Summary Judgment will be denied.

An appropriate order follows.

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EILEEN SMITH	:	
	:	
v.	:	
	:	
GERALD FRANCISCO and SOUTH	:	
JERSEY POLLUTION CONTROL, INC.	:	NO. 98-1553

ORDER

AND NOW, this _____ day of January, 1999, after consideration of the defendants' motion for summary judgment, the plaintiffs' reply, and defendants' response thereto, IT IS ORDERED that Defendants' Motion for Summary Judgment is DENIED.

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William H. Yohn, Jr., J.